United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7357

To be argued by
JEROLD OSHINSKY

In The

United States Court of Appeals

For The Second Circuit

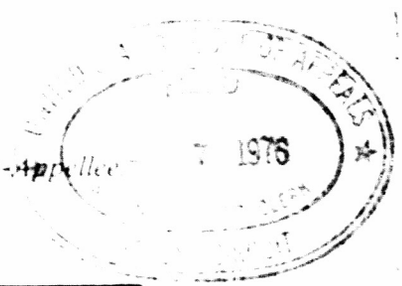
HERZOG & STRAUS, a partnership organized under the laws of the State of New York,

Plaintiff-Appellant,

-against-

GRT CORPORATION,

Defendant-Appellee.



BRIEF FOR PLAINTIFF-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Page

Other Authorities:

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Appeal No. 76-7357

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BRIEF OF PLAINTIFF-APPELLANT HERZOG & STRAUS

Preliminary Statement

The appellant, Herzog & Straus, a New York partnership of certified public accountants, appeals from an order of the United States District Court for the Southern District of New York by the Honorable Whitman Knapp granting summary judgment in favor of defendant-appellee, GRT Corporation ("GRT"). Summary judgment was granted (a) without a motion having been made by GRT, without any notice to Herzog & Straus, without an evidentiary hearing on genuine issues of material fact and in complete disregard of Rule 56 of the Federal Rules of Civil Procedure and (b) upon the

erroneous premise that the complaint is based upon prima facie tort and not upon tortious interference with contract or business relations.

On June 18, 1976, Herzog & Straus brought suit in the Supreme Court of the State of New York for injunctive relief and damages predicated upon the defendant's interference with Herzog & Straus' contractual and business relationships with three of Herzog & Straus' clients, Arista Records, Inc. ("Arista"), Publishers Licensing Corp. ("Publishers") and Chrysalis Music Corporation ("Chrysalis"). The gravamen of the complaint was that Herzog & Straus had been hired by Arista, Publishers and Chrysalis to perform an audit of the books and records of a division of defendant, GRT, and that GRT wrongfully had refused Herzog & Straus access. Simultaneously with the filing of its complaint, Herzog & Straus moved for a preliminary injunction.

On June 24, 1976, GRT removed this action to the Court below and on June 28, 1976, four days after removal, a session was held before the District Court Judge to whom this case was assigned. Without waiting to hear argument on the motion for an injunction, the District Court Judge announced that the complaint failed to state a claim for relief in prima facie tort. Although

Herzog & Straus contended that it was proceeding on other legal theories, the Court, without advance notice or a hearing, and on its own motion, peremptorily granted GRT summary judgment. Indeed, GRT had not contended that the complaint sounded solely in prima facie tort, nor had GRT moved for summary judgment.

Issues Presented for Review

1. Whether summary judgment may be granted on the Court's own motion without any advance notice, without fulfilling the notice and hearing requirements of F.R.C.P. 56 and without an evidentiary hearing on genuine issues of material fact.

2. Whether the complaint stated a claim for relief either on the theory of tortious interference with a contractual relationship or tortious interference with a business relationship.

Statement of the Case

The Parties

Appellant, Herzog & Straus, is a New York partnership of certified public accountants primarily engaged in the business of performing audits of music industry companies to determine whether their clients, including recording artists and composers, are being paid all

royalties to which they are entitled.

The appellee, GRT, is a California corporation engaged in the business of manufacturing, selling and distributing pre-recorded music tapes.

The Complaint

The complaint alleges that Herzog & Straus was hired by three of its clients, Arista, Publishers and Chrysalis to audit the books and records of GRT Music Tapes, a division of GRT and that GRT improperly has refused Herzog & Straus access to GRT's books and records to perform the required audit. ("App. 6-a")*

The complaint also alleges that the audit is a contractual obligation agreed to by GRT in its contracts with Herzog & Straus' clients and that it is customary to allow audits by certified public accountants of companies manufacturing records and tapes to insure that correct royalties are being paid. These facts are not disputed since GRT admitted below that it had a contractual obligation to permit Herzog & Straus' clients to select their auditor:

> "Each of the agreements [between GRT and Arista, Publishers and Chrysalis] contain a provision

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*"App. -a" refers to the Appendix on Appeal.

> which entitles the contracting companies to audit the books and records of GRT for purposes of verifying royalty payments paid and to be paid by GRT." Affidavit of Leonard Ware dated June 23, 1976, par. 3 (App. 30-a)

Pursuant to this contractual provision, Herzog & Straus' clients selected and engaged it as their auditor but GRT refused Herzog & Straus access to its books and records and demanded that Herzog & Straus' clients select another auditor.

The complaint thus alleged (a) the existence of contractual relationships between GRT and Herzog & Straus' three clients, (b) GRT's knowledge of the existence of the contracts between Herzog & Straus and Arista, Publishers and Chrysalis, (c) GRT's intentional interference with and procurement of the breach of those contracts and (d) damages to Herzog & Straus including loss of fees.

The Decision Below

At the hearing of Herzog & Straus' motion for a preliminary injunction, the Court, sua sponte, without GRT having raised the point, equated tortious interference with a contractual or business relationship solely with prima facie tort. The Court found that Herzog & Straus' surmisal that the reason for GRT's refusal to allow

Herzog & Straus access to GRT's books and records might emanate from Herzog & Straus' prior successful audits* warrants summary judgment even though GRT had not moved for summary judgment. The Court, taking Herzog & Straus completely by surprise, held that even if GRT's self-interest motivation in barring access to Herzog & Straus was an illegal one, it was sufficient completely to defeat a claim grounded in prima facie tort.

> "On oral argument in this diversity action, plaintiff's counsel expressly stated that defendant had excluded plaintiff from its premises for the express purpose of avoiding an audit performed by plaintiff which might have shown defendant to be a crook. Transcript, at 8, 12. By thus conceding that defendant has a selfish motive for its conduct, plaintiff has conclusively established that it has no cause of action in prima facie tort." Memorandum and Order dated July 8, 1976 (App. 50-a)

The Court, in Herzog & Straus' view, misconstrued Herzog & Straus' statement to the Court pertaining to the motivation for GRT's conduct (Transcript, App. 44-a):

> COURT: [A]ll you could allege to defend a motion for summary judgment would be that his purpose in keeping you out of his premises was to prevent you from proving that he was a thief.
>
> That was his purpose wasn't it?

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*See page 9, infra. Prior audits by Herzog & Straus uncovered substantial underpayments by GRT to Herzog & Straus' clients.

MR. OSHINSKY: That is our impression of what his purpose was.

THE COURT: I am assuming that that is what you are alleging.

MR. OSHINSKY: We think it goes beyond that."

Thus, Herzog & Straus did not "admit" that GRT had a valid economic justification, was not privy to the real motivation for GRT's conduct and was precluded from exploring the real motivation for GRT's improper conduct.

More importantly, Herzog & Straus contended that its complaint did not sound in prima facie tort. Indeed, the gravamen of the complaint was GRT's tortious interference with Herzog & Straus' contractual or business relations. Herzog & Straus' position below was that an illegal or unreasonable justification was not a defense to such interference (Transcript, App. 43-a):

"MR. OSHINSKY: I do not believe, standing here, Your Honor, that it's a correct interpretation of New York law that the alleged excuse which purportedly justifies an interference with contractual relations can be an improper or unlawful excuse."*

The Court, though, had determined that the action

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*As shown below, Herzog & Straus still contend that its statement of the law was correct and indeed, any wilful interference (whether illegal or not) may constitute a legal wrong. (See pages 17-24 infra.)

was solely for prima facie tort and that GRT's purported economic justification (which was not even raised by GRT), was a complete defense.

Factual Chronology

On or about April 17, 1976, Arista engaged Herzog & Straus to perform an audit of GRT's books and records. On April 19, 1976, Arista wrote to GRT requesting that GRT make available to Herzog & Straus the relevant books and records of GRT so that Herzog & Straus could perform an audit to determine whether GRT was paying proper royalties to Arista. Affidavit of Ira Herzog dated June 8, 1976 ("Herzog affidavit"), par. 5, (App. 19-a); Exhibit A annexed thereto (App. 25-a).

Similarly, on April 23, 1976, Herzog & Straus wrote to GRT stating that, in addition to the audit on behalf of Arista, Herzog & Straus had been retained to perform an audit on behalf of two other clients of Herzog & Straus, Publishers and Chrysalis. The letter also requested that GRT contact Herzog & Straus to arrange a mutually convenient date for the audit. Herzog affidavit, par. 6, (App. 19-a); Exhibit C annexed thereto (App. 27-a).

By letter dated May 10, 1976, GRT denied Herzog & Straus access to GRT's books and records, stated that GRT had informed Arista and Publishers of its decision not to

permit Herzog & Straus access to GRT's books and records and demanded that Herzog & Straus' clients hire other auditors. T' s, there appears to be no dispute that GRT knowingly intended its conduct to impede the business of Herzog & Straus and interfere with its contractual relationship with its clients. Simply stated, GRT has determined to blackball Herzog & Straus. Herzog affidavit, par. 8 (App. 20-a); Exhibit D annexed thereto (App. 28-a).

In an affidavit by one of Herzog & Straus' partners, Ira Herzog (the Herzog affidavit), Herzog & Straus surmised that a possible reason for the refusal to permit Herzog & Straus access to GRT's books and records was their prior success in uncovering substantial underpayments in previous audits. At the June 28, 1976 session before Judge Knapp, Herzog & Straus' counsel offered the same speculation but was precluded from exploring the real motivation for GRT's conduct. Judge Knapp incorrectly took these speculations as an "admission" that GRT had an economic justification to bar access to Herzog & Straus and that such justification per se barred an action for prima facie tort. Herzog & Straus' argument that its action did not lie in prima facie tort but in interference with contractual or business relations was ignored by the

Court below.* Herzog affidavit, par. 10 (App. 21-a-22-a); Transcript (App. 38-a-49-a)

It is likely that GRT simply intended to inflict harm upon Herzog & Straus in retribution for earlier successes. This was confirmed, in part, by the affidavit dated June 23, 1976 of Leonard Ware, a director and corporate secretary of GRT, which stated:

> "4. With respect to all three of the contracting companies referred to in the complaint, GRT has communicated its desire that the audit be conducted by a certified public accounting firm other than plaintiff; the reasons therefor originate in past audits conducted by plaintiff which have caused GRT grave concern with respect to the business and accounting practices of plaintiff. . . ." (App. 31-a)

Here, there is no doubt that GRT acted improperly since it concededly breached contracts with Herzog & Straus' clients in which GRT authorized them to select an auditor of GRT's books and records. Nor could Herzog & Straus "[redacted]t" the nature of GRT's alleged justification for its conduct since this would be a material question of fact peculiarly known only to GRT and not to Herzog & Straus.**

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*As shown herein, even such economic justification, if established, would not be a per se defense to the complaint as construed by the Court as alleging prima facie tort.

**GRT's "motives and knowledge cannot be within plaintiff's personal knowledge" State Enterprises, infra, 238 N.Y.S.2d at 726. Moreover, when Herzog & Straus sought to have GRT state the reasons for its conduct, the Court would not permit such inquiry (Transcript, App. 48-a). At a minimum, pre-trial discovery should have been permitted.

Hence, Herzog & Straus' speculations did not warrant summary judgment under any set of circumstances and even if such speculations were established, they would support and not defeat a claim of interference.

Summary of Argument

Herzog & Straus contend that the Court below improperly took it by surprise by granting summary judgment without any advance notice, without following the notice and hearing requirements of F.R.C.P. 56 and without an evidentiary hearing as to GRT's motive and other material questions. Substantial material questions of fact are raised as to the bona fides of GRT's conduct particularly since GRT (a) admittedly breached three contracts with Herzog & Straus' clients which permitted them to select an auditor of their choosing and (b) knowingly interfered with the implementation of the contracts between Herzog & Straus and three of their clients.

Herzog & Straus also contend that the Court improperly construed the complaint as sounding in prima facie tort and not in interference with business or contractual relations. Further, Herzog & Straus contend that the Court's ultimate finding of fact that GRT's conduct was economically justified was based on an incomplete and inconclusive record below. While the Court's holding that such

justification per se bars the complaint for "prima facie tort" is erroneous, more importantly, the complaint alleges interference with contractual or business relations. An alleged economic justification does not bar those claims. At a minimum, Herzog & Straus should be permitted to replead.

POINT I

SUMMARY JUDGMENT CANNOT BE GRANTED WITHOUT FOLLOWING THE NOTICE AND HEARING REQUIREMENTS OF F.R.C.P. 56 AND WITHOUT AN EVIDENTIARY HEARING ON MATERIAL ISSUES OF FACT

A. The General Rule Disfavors Summary Judgment

It is well settled that District Courts must be extremely reluctant to grant summary judgment especially when a critical issue relates to the subjective intent of a party.

For example, in Cali v. Eastern Airlines, Inc., 442 F.2d 65 (2nd Cir. 1971), the Second Circuit reversed the lower court's grant of summary judgment to defendant where motive and intent were in issue (442 F.2d at 71):

> "If undisputed evidentiary facts disclose competing material inferences as to which reasonable minds might disagree, the motion must be denied. Lemelson v. Ideal Toy Corp., 408 F.2d 860 (2d Cir. 1969). 'This admonition should especially be kept in mind when the inferences which the parties seek to have

drawn deal with questions of motive, intent, and subjective feelings and reactions' . . . ." (emphasis added).

A similar case is Preston v. United States Trust Company of New York, 394 F.2d 456 (2d Cir. 1968), cert. denied, 393 U.S. 1019 (1969), where this Court reversed the lower court's granting of a motion for summary judgment on a ground that could not be discerned from the defendants' moving papers. There, as here, the appellant contended that he was "taken by surprise" and the order granting summary judgment was reversed (394 F.2d at 461).

In this case the ground upon which summary judgment was granted was not even raised or inferred by appellee but was raised by the Court to Herzog & Straus' complete shock and surprise. Moreover, the parties were before the Court in connection with a preliminary injunction motion, no motion for summary judgment having been made.

The District Court incorrectly assigned the label of prima facie tort to the complaint and granted summary judgment on the basis that purported economic justification barred a prima facie tort claim. Herzog & Straus was taken by surprise since it did not regard its claim as a claim for prima facie tort but for tortious interference with a contractual or a business relationship and was not prepared to deal with the question whether even an illegal

justification would be a complete defense.*

The District Court violated the fundamental tenet of Rule 8(f) by construing the complaint as grounded solely in prima facie tort:

> "Following the simple guide of Rule 8(f) that 'all pleadings shall be construed as to do substantial justice,' we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. Cf. Maty v. Grasselli Chemical Co., 303 U.S. 197." Conley v. Gibson, 355 U.S. 41, 48 (1957)

As this Court recently stated in Rich v. New York Stock Exchange, 522 F.2d 153, 158 (2d Cir. 1975), it is "unfair to plaintiffs to hold them to a judgment based on issues of which they had no warning. . ."

B. The Requirements of F.R.C.P. 56 Were Not Followed

Rule 56(c) provides that a motion for summary judgment shall be served at least 10 days before the time

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*Herzog & Straus will demonstrate below that an illegal justification is certainly no defense to a tortious interference claim and is not an absolute defense to a prima facie tort claim either.

fixed for the hearing and that the adverse party shall have the opportunity to serve opposing affidavits. Here, Herzog & Straus' rights were trampled upon since they had no notice that the Court was contemplating a summary judgment and no meaningful opportunity to be heard as to issues raised for the first time by the Court at the preliminary injunction hearing.

Indeed, when counsel for GRT sought to provide GRT's position on the merits, the Court below said that would not be necessary and rejected Herzog & Straus' request for that information (Transcript, App. 48-a):

> "MR. PARCHER: If your honor please, I'm very loath to make any comments in view of your Honor's ruling. I'm just wondering, on the assumption my adversary is going to take this matter up, if it wouldn't be in my client's best interests to give you the other reasons why you should not have granted his motion.
>
> MR. OSHINSKY: We'd be very happy to hear them, your Honor.
>
> THE COURT: It will just confuse the record."

Obviously, GRT was not relying upon an economic justification for its conduct but upon other matters which were not developed.

C. An Evidentiary Hearing Was Required on Material Questions of Fact

Moreover, not only has the Second Circuit been reluctant to sustain summary judgment in general but more

specifically where there has been no evidentiary hearing. In United States v. J. B. Williams Company, Inc., 498 F.2d 414 (2d Cir. 1974), the Court reversed, inter alia, the granting of summary judgment stating (498 F.2d at 430, fn. 19):

> "There is no question that under F.R.Civ. P. 56, whether in a jury trial or a trial to the court, the party opposing the summary judgment motion has a right to a full evidentiary hearing on all genuine issues of material fact."

See also, American Manufacturers Mutual Insurance Company v. American Broadcasting - Paramount Theatres, Inc., 388 F.2d 272 (2d Cir. 1967).

Not only did Herzog & Straus not have an opportunity for a full evidentiary hearing, but it did not even have the opportunity to prepare for the motion for summary judgment.

Here, the genuine issues of material fact involve the actual reasons for GRT's exclusion of Herzog & Straus from conducting an audit and the reasonableness of that conduct which concededly involved a breach of GRT's contracts with Herzog & Straus' clients. A hearing should have been held on these issues.

POINT II

THE COMPLAINT PLEADS VALID CLAIMS WHICH RAISE MATERIAL QUESTIONS AS TO IMPROPER INTERFERENCE WITH CONTRACTUAL OR BUSINESS RELATIONS

Contrary to the decision of the Court below, the complaint and the Herzog affidavit sufficiently allege facts to support valid claims for tortious interference with a contractual or business relationship. A purported economic justification is not a per se bar to these claims. In any event, GRT does not even rely on an economic justification but asserts distress over Herzog & Straus' purported business practices (Ware aff., par. 12, App. 35-a). Certainly material questions are raised which defeat summary judgment.

A. The Complaint and Herzog Affidavit Show That Plaintiff Has A Valid Claim For Tortious Interference With A Contractual Relationship

The complaint, as supported by the Herzog affidavit, sufficiently pleads a theory of interference with Herzog & Straus' contractual relationships with three of its clients and the case should be remanded to permit Herzog & Straus to prove its case.

The complaint alleges sufficient facts which show that in 1976 Herzog & Straus entered into a relationship with its clients whereby Herzog & Straus was hired to

audit the books and records of GRT on their behalf.*

It is well settled in New York that a cause of action lies for inducing breach of contract or for interfering with an existing contract.

See generally, Campbell v. Gates, 236 N.Y. 457, 141 N.E. 914 (1923); Hornstein v. Podwitz, 254 N.Y. 443, 173 N.E. 674 (1930); Phillips & Benjamin Co. v. Ratner, 206 F.2d 372 (2d Cir. 1953); Welsch v. Campbell, 94 N.Y.S.2d 860 (Sup. Ct. 1950), aff'd, 278 App. Div. 605, 102 N.Y.S.2d 51 (3rd Dept. 1951).

In Hornstein, the Court reiterated the elements of a claim for inducing breach of contract (254 N.Y. at 447):

> "[O]ne who, having knowledge of an existing valid contract between others, intentionally, knowingly, and without reasonable justification or excuse, induces one of the parties to the contract to breach it to the damage of the other party, is liable in an action to recover the

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*At trial, Herzog & Straus will show that it entered into oral, bilateral contracts with Arista, Publishers and Chrysalis on a fee basis. These oral contracts were confirmed in writing. See Exhibits A, B and C to the Herzog affidavit (App. 25-a, 26-a and 27-a, respectively). Moreover, an oral contract is sufficient to uphold a claim for tortious interference with a contractual relationship. Cf. Rothschild v. World-Wide Automobiles Corp., 24 App. Div.2d 705, 264 N.Y.S.2d 705 (1st Dept. 1965), aff'd, 18 N.Y.2d 982, 278 N.Y.S.2d 218 (1966).

> damages suffered. The action is premised on the intentional interference without justification with contractual rights, with knowledge thereof. Such interference constitutes a legal wrong, and, if damages result therefrom, a valid cause of action exists therefor."*

At trial, Herzog & Straus will establish each of these elements:

1. The existence of valid contracts - the complaint pleads and GRT does not deny (GRT in fact admits) the existence of contractual relations between Herzog & Straus and its clients.

2. GRT's knowledge of such contracts - the letters from Arista, Publishers and Herzog & Straus placed GRT on notice of the existence of the contractual relationships.

3. GRT's intentional procuring of the breach of the contracts - GRT has admitted that it has barred Herzog & Straus and has told Herzog & Straus' clients to seek other auditors.

4. Damages - there is no question that Herzog & Straus will suffer damages from its inability to perform

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*These standards also are set forth in 32 N.Y. Jur., Interference, §19, p. 181).

its contracts with its clients since it will lose three audit fees and suffer damage to its reputation.

After Herzog & Straus establish these elements, the burden shifts to GRT to establish a "reasonable" justification and not any self-motivated justification as held below. "Reasonableness" necessarily is a question of fact requiring a jury trial.

The Court below ignored the above facts and applicable legal principles on the erroneous ground that this was solely an action for prima facie tort and since allegedly that GRT's motive was its own economic gain, such purported motive was held dispositive of the action.*

But the very case cited by the Court below in its memorandum decision Benton v. Kennedy & Van Saun Manufacturing & Engineering Corp., 2 App. Div.2d 27, 152 N.Y.S.2d 955 (1st Dept. 1956), demonstrates that a single claim may involve prima facie tort and tortious interference with a contractual relationship and that at a minimum, the plaintiff should have the right to replead to clearly specify a claim for interference (id. at 959):

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*But even the furthering of one's own economic interests is not a sufficient justification as shown in (B) infra.

> "Since plaintiff's failure to plead a good cause of action for wrongful interference with contract may be due to his attempt to blend it with an action for prima facie tort, we are loath to disturb the exercise of discretion by Special Term in granting leave to serve a fifth amended complaint." (emphasis added)

The complaint and Herzog affidavit sufficiently allege torts of inducing breach of contract or interfering with business relations, raise substantial and material questions of fact and the action should not have been dismissed summarily.

B. The District Court Was In Error In Holding That Any Selfish Justification Is Sufficient To Defeat Herzog & Straus' Claim For Relief

The District Court held that the action failed because "[b]y thus conceding that defendant has a selfish motive for its conduct, plaintiff has conclusively established that it has no cause of action in prima facie tort." (App. 50-a).

Herzog & Straus' counsel argued (Transcript, App. 40-a), that an improper justification is not sufficient to defeat a claim for interference with a contractual relationship as a matter of New York law. This contention is amply supported by Benton v. Kennedy-Van Saun Manufacturing & Engineering Corp., 2 App. Div.2d

27, 152 N.Y.S.2d 955, 958 (1st Dept. 1956), the very case cited by the District Court in its memorandum and order in support of its granting summary judgment on Herzog & Straus' presumed cause of action in prima facie tort.*

In Avon Products, Inc. v. Berson, 206 Misc. 900, 135 N.Y.S.2d 867, 871 (Sup. Ct. 1954), the court recognized the tendency to extend the doctrine of intentional interference with contracts and reiterated the widely recognized rule that selfish motive would not constitute sufficient justification:

> "The tendency has been to extend the doctrine of liability [for intentional interference with contract] and to broaden its scope to include 'all culpable damaging invasions of contract relations'. Carpenter: 'Interference with Contract Relations', 41 Harv. L.R. 728.
>
> "It has accordingly been held that it is not a justification for knowingly procuring a breach of a contract that defendant acted without an improper purpose but only to promote and advance his own economic interest. This principle has been stated and applied in numerous decisions in this country, such as Sorenson v. Chevrolet Motor Co., 171 Minn. 260, 214 N.W. 754, 84 A.L.R. 35; R.W. Hat Shop v. Scully, 98 Conn. 1, 118 A.55, 29 A.L.R. 551; Monte Vista Potato Growers' Ass'n. v. Bond, 80 Colo. 516, 252 P. 813; and California Grape Control Board v.

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*Similarly, the justification which will allow the defendant to escape liability for prima facie tort must be one which the law will recognize. Advance Music Corp. v. American Tobacco Co., 296 N.Y. 79, 85, 70 N.E.2d 401 (1946). The justification for defendant's conduct cannot involve a violation of law and be construed as reasonable.

California Produce Corp., 4 Cal. App.2d 242, 40 P.2d 846."

Similarly, in Noah v. L. Daitch & Co., 192 N.Y.S.2d 380, 386 (Sup. Ct. 1959), the Court clearly held that the defendant's self-interest is not a sufficient justification for its intentional interference with a contract for a definite duration:

> "The defendant Shopwell is charged with the tort known as 'inducing breach of contract'. It is important to distinguish existing contracts having a definite date of duration and at-will business relationships. In the former case, intentional interference by a third party, inducing its breach, is actionable, even in the absence of malice and even where the motive is the self-interest of the third party."

See also, Terry v. Dairymen's League Co-op Ass'n, 2 App. Div.2d 494, 157 N.Y.S.2d 71, 79 (3rd Dept. 1956); 32 N.Y. Jur., Interference §29, p. 189.

In the case at bar, Herzog & Straus will establish a contract within these authorities which was clearly unlawfully interfered with by GRT. Despite the fact that a claim of justification for GRT's conduct would be a matter of affirmative defense for which GRT would have the burden of proof (State Enterprises, Inc. v. Southridge Coop. Sec. 1, Inc., 18 App. Div.2d 226, 238 N.Y.S.2d 724, 726 (1st Dept. 1963)), the lower court has

latched on to Herzog & Straus' speculations concerning GRT's motives and granted summary judgment based upon GRT's purported economic justification. Under the foregoing cases, however, such a defense is defective as a matter of law, at least raises questions of fact and the granting of summary judgment certainly is unwarranted.

CONCLUSION

For the reasons stated herein, the decision of the Court below should be reversed and the complaint reinstated. Alternatively, the case should be remanded with Herzog & Straus given the opportunity to replead.

Respectfully submitted,

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A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Index No.

HERZOG & STRAUS,

Plaintiff-Appellant,
- against -

GRT CORPORATION,

Defendant-Appellee.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Victor Ortega, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1027 Avenue St. John, Bronx, New York

That on the 7th *day of* Sept *1976 at* **1370 Avenue of the Americas New York, N.Y.**

deponent served the annexed brief *upon*

Arrow, Silverman & Pargher

the attorneys *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein.*

Sworn to before me, this 7th *day of* September *19*76

Beth A. Hirsh

BETH A. HIRSH
NOTARY PUBLIC, State of New York
No. 41-4623156
Qualified in Queens County
Commission Expires March 30, 1978

Victor Ortega

VICTOR ORTEGA